

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ISMAEL ALARCON

Claimant

VS.

MONFORT, INC.

Respondent

Self-Insured

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Docket No. 205,242

ORDER

Claimant appeals the award of Administrative Law Judge Pamela J. Fuller dated June 30, 1999. The Administrative Law Judge limited claimant's award to a scheduled injury to the shoulder, finding claimant had failed to prove that his alleged back injury arose out of and in the course his employment and further failed to prove that he provided timely notice to respondent of this alleged back injury. Oral argument was held December 1, 1999.

APPEARANCES

Claimant appeared by his attorney, Stanley R. Ausemus of Emporia, Kansas. Respondent appeared by its attorney, Terry J. Malone of Dodge City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as set forth in the award of the Administrative Law Judge are adopted by the Appeals Board for the purposes of this award.

ISSUES

- (1) What is the nature and extent of claimant's injury and/or disability? Particularly, does claimant's injury include both the shoulder and the back or is claimant's injury from August 25, 1995, limited to the right upper extremity, including the shoulder?

- (2) What was claimant's average weekly wage on the date of accident?
- (3) Did claimant provide timely notice of the accident pursuant to K.S.A. 44-520?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On August 25, 1995, claimant suffered accidental injury when he fell four to five feet onto a concrete surface, landing on his right shoulder. Claimant notified his supervisor, Fred Medina, of the injury. Mr. Medina acknowledged claimant told him that he had slipped and fallen on his shoulder, and when asked if claimant hurt anywhere else was advised that he hurt all over. Claimant was referred for medical treatment to Myron J. Zeller, M.D., with his first appointment on September 12, 1995. At that time, claimant advised Dr. Zeller he had injured his right shoulder. The history provided to Dr. Zeller's nurse also indicated a right shoulder injury. Dr. Zeller treated claimant for several months, with all treatment involving only the shoulder. Dr. Zeller's notes do not mention a back injury. On March 13, 1996, he returned claimant to his regular job at Monfort, without restrictions.

Claimant was referred by Dr. Zeller to Gary Michael Kramer, M.D., an orthopedic surgeon in Garden City, Kansas. He first examined claimant on November 26, 1996. The history provided Dr. Kramer was similar to that provided Dr. Zeller, in that claimant advised that he lost his balance and fell approximately five feet, landing on his right shoulder. Dr. Kramer initially thought claimant had a torn rotator cuff but also noted symptom magnification. An MRI was ordered to document the rotator cuff complaints, but came back normal. Dr. Kramer testified that there is nothing in his records to indicate that claimant ever mentioned a back injury.

Dr. Kramer referred claimant for a functional capacity evaluation with exercise physiologist Keith Bailey. The FCE was performed on October 16, 1997, and according to Mr. Bailey's report, resulted in an invalid test due to claimant's failure to put forth maximum effort.

Claimant was examined and/or treated by several doctors over a lengthy period after the accident. The first mention in the medical records of back involvement from this accident occurred in October 1996, almost fourteen months after the date of accident. While claimant alleges he told all of the doctors of his back injury, the medical reports through October 1996 are void of any mention of the back.

A Form E-1 filed by claimant's attorney on September 15, 1995, lists only right shoulder and arm injuries. The amended E-1, alleging involvement of the back and the neck, was filed October 31, 1996, fourteen months after the date of accident.

The Appeals Board, in considering the totality of the evidence, finds that, while claimant did suffer accidental injury on August 25, 1995, he did not suffer injury to his back at that time. The injury was limited to his right shoulder and upper extremity.

The Administrative Law Judge, in considering the medical reports of Pedro A. Murati, M.D., Terrance C. Tisdale, M.D., and C. Reiff Brown, M.D., found claimant to have suffered a 7 percent functional impairment to the right upper extremity at the shoulder. The Appeals Board agrees and awards claimant a 7 percent functional impairment to the right upper extremity at the shoulder.

The Administrative Law Judge also found that claimant failed to provide notice of the back injury. However, K.S.A. 44-520 requires that respondent be provided notice of the "accident." In this instance, respondent acknowledged claimant advised them of the fall on August 25, 1995. Claimant's supervisor, Mr. Medina, testified that claimant had told him on the date of accident that he had fallen on his shoulder. Therefore, claimant did provide notice of the "accident." The dispute regarding the shoulder versus the back is a dispute regarding nature and extent, rather than one of notice. In that regard, the award of the Administrative Law Judge is modified.

With regard to the claimant's average weekly wage, the Appeals Board finds that the award of the Administrative Law Judge sets out findings of fact and conclusions of law in sufficient detail and that claimant has an average weekly wage of \$324.80 based upon \$7.50 per hour and a five-day work week. While claimant alleges he was hired to work six days a week, the evidence does not support claimant's contention that he was regularly expected to work six days per week. The record further fails to show that claimant ever actually worked six days a week. The record more clearly supports respondent's contention that claimant was hired to work 40 hours per week with some overtime.

The Board affirms the award of 7 percent to the upper extremity at the shoulder but notes a 7 percent award grants 15.75 weeks rather than that awarded. This computation error will be corrected in the award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the award of Administrative Law Judge Pamela J. Fuller dated June 30, 1999, should be, and

is hereby, affirmed, and that claimant is granted an award against the respondent, Monfort, Inc., a qualified self-insured, for an accidental injury occurring on August 25, 1995, for a 7 percent permanent partial scheduled injury to the right shoulder.

Claimant is entitled to 15.75 weeks permanent partial disability compensation (after computation correction) at the rate of \$216.54 per week in the amount of \$3,410.51, for a 7 percent loss of use of the right upper extremity at the shoulder. At the time of this award, the entire amount is due and owing and ordered paid in one lump sum minus any amounts previously paid.

Claimant's contract of employment with his attorney is affirmed insofar as it does not contravene the applicable provisions of K.S.A. 44-536.

The fees and expenses required to administer the Workers Compensation Act are assessed against the respondent to be paid as follows:

Underwood & Shane

Transcript of Proceedings	\$219.25
Transcript of Proceedings	\$350.50
Deposition of C. Reiff Brown, M.D.	\$249.00
Deposition of C. Reiff Brown, M.D.	\$188.50

Cindy L. Fenton, CSR

Deposition of Mitch Menlove	\$ 91.98
Deposition of Roxana Garcia	\$ 72.20
Deposition of Ken Barnett	\$201.25
Deposition of Fred Medina	\$101.56
Deposition of Gary M. Kramer, M.D.	\$123.25

Hostetler & Associates, Inc.

Deposition of Mitch Wood	Unknown
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K. Pfannenstiel Reporting & Associates

Deposition of Myron J. Zeller, M.D.	\$154.38
Deposition of Keith Bailey	\$203.49
Deposition of Margaret Beatriz	\$ 39.15

Seaman Court Reporting

Deposition of James T. Molski	\$212.80
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Court Reporting Service

Deposition of Terrance C. Tisdale, M.D.

Unknown

Ireland Court Reporting

Deposition of Pedro A. Murati, M.D.

\$199.00

IT IS SO ORDERED.

Dated this ____ day of December 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Emporia, KS
Terry J. Malone, Dodge City, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director